

1/5/01

**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

Paper No. 18  
RFC

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re Colorado Avalanche, LLC

Serial No. 74/692,389

Anita K. Andrade and Mary J. Sotis of NHL Enterprises, L.P.  
for Colorado Avalanche, LLC.  
Kim Saito, Trademark Examining Attorney, Law Office 109  
(Ronald Sussman, Managing Attorney).

Before Cissel, Hairston and Bottorff, Administrative  
Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On August 22, 1995, applicant<sup>1</sup> filed the above-  
referenced application to register the mark "AVALANCHE" on  
the Principal Register for goods which were subsequently  
identified by amendment as "clothing commemorative of and  
intended to show support for a professional hockey team,  
namely, shirts, jerseys, sweaters, jackets, sweatshirts,

---

<sup>1</sup> This application was originally filed by Comsat Video Enterprises, Inc, but the amendment to allege use was filed by Colorado Avalanche, LLC, and appropriate documents attesting to the assignment were subsequently filed and recorded.

t-shirts, footwear, pants, sweatpants, warm-up suits, wristbands, headbands, shorts, caps, pants, socks, nightshirts, scarves, mittens and cloth bibs," in Class 25. The application was based on applicant's assertion that it possessed a bona fide intent to use the mark on these goods in commerce.

Registration was refused under Section 2(d) of the Lanham Act on the ground that if applicant's mark were used in connection with the goods listed in the application, it would so resemble the mark "AVALANCH," which is registered<sup>2</sup> for "clothing, including outerwear; namely, jackets and coats, and sportswear, namely; pants, skirts, shorts, vests, dresses, shirts, suits and blouses," in Class 25, that confusion that would be likely. Another subsisting registration was originally also cited as a bar to registration, but that refusal was subsequently withdrawn.

When the refusal to register based on the registered mark "AVALANCHE" was made final, applicant concurrently filed a Notice of Appeal and an amendment to allege use as of August 15, 1995. Shortly thereafter, applicant filed its brief on appeal, but did not request an oral hearing

---

<sup>2</sup> Reg. No. 1,717,128 was issued to G-III Apparel Group, Ltd., a Delaware corporation, on September 15, 1992. Combined affidavit under Sections 8 and 15 of the Act accepted and acknowledged.

before the Board. The Examining Attorney accepted the amendment to allege use and then submitted her appeal brief to the Board. Applicant did not file a reply brief.

At the outset, we note that we have not considered the additional evidence submitted with applicant's brief on appeal, the third-party registrations listed in applicant's arguments, or the unpublished decisions referred to in applicant's appeal brief.

The additional evidence was properly objected to by the Examining Attorney as being untimely under Trademark Rule 2.142(d). The record in an application should be complete prior to the filing of a notice of appeal. Applicant's alternative argument that action on the application should have been suspended and the application should have been remanded to the Examining Attorney for consideration of the additional evidence is not well taken because applicant offered no explanation as to why this evidence could not have been timely made of record. Indeed, from a casual perusal of these materials, it appears that they could have been made available for timely submission during the examination of the application before the Examining Attorney prior to the appeal.

With regard to the list of third-party registrations, as the Examining Attorney noted earlier in the prosecution

of this application, the Board does not take judicial notice of registrations on the Principal Register, and a submission of a list of such registrations is insufficient to make them of record. Proper copies are required. In re Duofold Inc., 184 USPQ 638 (TTAB 1974).

Lastly, applicant's references to unpublished decisions is plainly inappropriate. Opinions which are not designated for publication are not citable as precedent. General Mills Inc. v. Health Valley Foods, 24 USPQ2d 1270 (TTAB 1982).

Turning, then, to the merits of the issue on appeal, based on careful consideration of the written record and arguments, and in view of the statute and legal precedent on this issue, we hold that the refusal to register is appropriate because confusion is likely.

The test for likelihood of confusion is well settled. Our primary reviewing court enumerated the factors to be considered in resolving this issue in In re E.I. duPont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Chief among these factors are the similarity of the marks and the commercial relationship between the goods which are identified by the marks.

In the instant case, confusion is likely because the marks are identical and goods are in part identical, in

that both the registration and the application list "jackets," "shorts" and "shirts." All of the products listed in the application and the registration are ordinary items of apparel. The "jackets," "shorts" and "shirts" in the cited registration are not limited to particular types of shirts, as discussed below, so we must assume that they include jackets, shorts and shirts of the type specified in the application.

Applicant makes a number of unpersuasive arguments in support of its contention that confusion is not likely. Its main point revolves around the fact that applicant's primary business is operating a professional hockey team. Applicant argues that purchasers of the clothing items bearing the mark it seeks to register here purchase these products in order to show affiliation with and support for applicant's hockey team. As the Examining Attorney points out, however, the mark here sought to be registered makes no reference, either with words or designs, to applicant's hockey activities. We therefore have no basis upon which to adopt applicant's argument that the mark is used only in conjunction with and in reference to its hockey team, and therefore that the reference to hockey serves to distinguish applicant's mark from the cited registered mark.

We must determine whether confusion is likely based upon consideration of the goods as they are identified in the application and the cited registration, respectively, without limitations or restrictions which are not reflected therein. Toys "R" Us, Inc. v. Lamps R Us, 219 USPQ 340 (TTAB 1983). Although the mark sought to be registered makes no reference to applicant's hockey team, applicant has referred to its hockey activities in the identification-of-goods clause and in arguments throughout the prosecution this application, but the cited registration does not reflect any such limitation. Accordingly, we must interpret the unrestricted way in which the registration identifies the clothing items listed therein as including all types of such items of apparel, i.e., as including jackets, shorts and shirts which are intended to show support for athletic teams, just as applicant's jackets, shorts and shirts are.

In a similar sense, we cannot adopt applicant's argument that confusion is not likely because applicant and registrant do not share the same channels of trade. As the Examining Attorney points out, applicant's arguments and extrinsic evidence about the nature of registrant's goods are not persuasive because the registration is not limited or restricted in any way on its face. The unrestricted way

the goods in the registration are identified must be interpreted to include all normal channels of trade for the goods listed therein, including the places where clothing items bearing the marks of sports teams are sold. In any event, the Examining Attorney has made of record advertisements from several retailers illustrating that clothing bearing sports team names and marks is sold alongside other clothing items which make no reference to particular teams.

Applicant's argument that confusion is not likely because applicant is not aware of any incidents of actual confusion is also not well taken. Evidence of actual confusion is notoriously difficult to come by, and it is not necessary in order to establish that confusion is likely. *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990).

In summary, confusion is likely in this case because the mark applicant seeks to register is identical to the registered mark, and the goods listed in the application are in part encompassed within the goods identified in the registration. Even if we had any doubt as to this conclusion, such doubt would necessarily be resolved in favor of the registrant and against the applicant, who, as the newcomer, had a duty to select a mark which would not

**Ser No.** 74/692,389

be likely to cause confusion with the mark already in use and registered. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988). Accordingly, the refusal to register under Section 2(d) the Lanham Act is affirmed.



**Ser No.** 74/692,389